United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

Proof of service

77-7237

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

NO. 77-7237

BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs-Appellees,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK

BRIEF OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

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THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

Preliminary Statement

This case is an appeal by the Port Authority of New York and New Jersey ("PA") from a final judgment of the District Court for the Southern District of New York (Pollack, D.J.) entered on May 20, 1977, granting plaintiffs-appellees' motion for summary judgment declaring invalid

the PA's resolution of March 11, 1976. That resolution denied permission to British Airways Board and Compagnie Nationale Air France (the "Airlines") to use the Concorde Supersonic Transport ("Concorde") at John F. Kennedy International Airport ("JFK") until the PA completed an independent evaluation of noise data for the Concorde based upon operating experience at airports in Washington, D.C., London and Paris. The order of the District Court also enjoined the PA from any action or inaction which would have the effect of preventing or impeding the commencement of Concorde operations by the Airlines into or out of JFK as described in the Secretary of Transportation's Decision of February 4, 1976.

The District Court's Memorandum Opinion ("Opinion") dated May 11, 1977 is not reported.

The District Court issued a stay of its own judgment until Tuesday, May 24, 1977 to enable the PA to move this Court for a further stay of the District Court's judgment pending the appeal of the District Court ruling. On May 24, 1977 this Court (Van Graafeiland, C.J., Waterman, C.J., Mehrtens, D.J.) extended the stay of judgment until June 1, 1977 to enable the parties to brief and argue the merits of this appeal.

The Issues Presented for Review

1. May an airport operator, acting as proprietor of an airport and in a non-discriminatory manner, exclude any aircraft on the basis of noise considerations?

2. Did the District Court err when it ruled that the PA resolution, which denied all supersonic transport aircraft permission to use JFK, violated the Supremacy Clause of the Constitution because it was in conflict with federal regulation on the matter of the Concorde SST?

Statement of the Case

As operator of the New York metropolitan area airports the PA has for many years been in the forefront of the industry in its attempts to minimize the impact of aircraft noise at its facilities.* In 1951, before commercial jet aircraft were introduced into service, the PA Board of Commissioners adopted a regulation that is still in force today which states that "no jet or turboprop aircraft may

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* The PA is an agency of the States of New York and New Jersey created by an interstate compact between them to which Congress has consented. Ch. 154, Laws of N.Y. 1921; Ch. 151, Laws of N.J., 1921; 42 U.S. Stat. 174 (1921).

land or takeoff at an air terminal without permission." Once commercial jet airliner service began, those aircraft which received PA approval were required to operate so that their noise levels would not exceed 112 perceived noise decibels.*

During the summer of 1974 the Airlines advised the Federal Aviation Administration ("FAA") that they desired to put the Concorde into service in the United States. The FAA prepared an Environmental Impact Statement on the Concorde ("EIS") in order to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq.

* For a detailed history of PA activity on the noise issue see Hearings on Aircraft Noise Problems conducted by the Subcommittees on Transportation and Aeronautics, and Health and Safety of the House Committee on Interstate and Foreign Commerce, 86th and 87th Cong., at 5-8 (1959).

On November 13, 1975 the Secretary of Transportation released that document to the public with the following statement in a cover letter:

> "Today I have released a copy of the Environmental Impact Statement on the applications of Air France and British Airways for an amendment of their operations specifications. If granted, the amendments would authorize the carriers to operate Concorde supersonic aircraft in limited commercial service to New York and Washington provided the airport operators agree". (emphasis supplied; copy attached to this memorandum as appendix "A").

Indeed, as stated in the FAA's final EIS on Concorde, the necessity for PA approval was known from the beginning.

> "It was understood by all concerned. . .that regardless of the Federal decision on the applications, the airlines must obtain any necessary authorization from the airport operators whose airports they proposed to serve before flights could be conducted to those airports. In this instance, while FAA operates Dulles International Airport, the Port Authority of New York and New Jersey operates John F. Kennedy International Airport." Final EIS on Concorde Supersonic Transport Aircraft (Sept., 1975) p. I-4.*

* See District Court Record, "Appendix to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment" (hereafter "Def. App.") at 51a to 52a. A similar statement was contained in the FAA's Draft EIS (March, 1975). Def. App., 61a.

The Secretary's Decision on the Concorde, rendered on February 4, 1976, granted the carriers' applications to conduct commercial flights into JFK but restricted them to a period of 16 months.* Toward the very beginning of his decision the Secretary noted that,

> "The FAA is the proprieter of Dulles [International Airport] and it is part of my decision today to direct the Federal Aviation Administration to permit one Concorde flight per day at Dulles by each carrier under the conditions noted. The situation with respect to JFK may be complicated by the fact that under federal policy that has hitherto prevailed, a local airport proprietor has had authority under certain circumstances to refuse landing rights." See District Court Record, "Secretary's Decision", p. 3 n. 6.

On March 11, 1976 the PA's Board of Commissioners adopted an interim ban on any supersonic transport operations at JFK. The resolution, which was unanimously adopted, read in critical part:

> "Resolved, that the Port Authority deny permission to operate any supersonic aircraft, including the Concorde, at Kennedy International

* Such service began at Dulles Airport in Washington, D.C., on May 24, 1976.

> Airport, until after at least six months of operating experience has been evaluated, after a report on such experience has been made to the Board and pending further action thereon by the Board. . ."

Six days later the Airlines filed a complaint in District Court challenging the PA's resolution seeking declaratory and injunctive relief. The PA answered the complaint within 20 days; however, the airlines did not move for summary judgment until July 12, 1976 and thereafter sought numerous adjournments of a hearing on that motion which was not argued until April 28, 1977. At no time did the Airlines ever seek preliminary injunctive relief from the PA resolution.

The Airlines' motion for summary judgment sought a declaration that the PA resolution of March 11 was invalid on several counts. Under one count it was alleged that the PA resolution was in colflict with federal actions implementing a federal scheme of preemption. Hence, the Airlines argued, the PA resolution was invalid under the Supremacy Clause, Article VI, Section 2 of the United States Constitution. The District Court found all of the Airlines' other grounds for relief to be inapplicable (Opinion, p. 31). The motion sought as well permanent injunctive relief from the PA resolution.

Statement of Interest of Amicus Curiae

The State of New York comes before this Court on behalf of its citizens and residents, particularly those 600,000 persons residing, working and studying in the vicinity of the JFK, urging a reversal of the District Court judgment. The decision below will harm the health, safety and environment of the State by subjecting communities never before affected by jet noise to the noise footprint of Concorde. Other communities already burdened with difficult conditions due to the noise of jet aircraft will suffer further degradation.

For example, the State's scientists have computed that at JFK on takeoff from Runway 4, Concorde will expose 100,000 residents to 100 EPNdB or more and 32,000 residents to 110 EPNdB or more. The B-707, the loudest subsonic jet frequenting JFK will expose 25,000 persons to 100 EPNdB or more and 1000 residents to 110 EPNdB or more. Outdoor communications at a distance of two feet would require shouting for those people within the 100 EPNdB single event footprints. FAA's Final EIS on Concorde, p. VI-67.

In addition the decision below seriously misinterprets federal law with respect to the proper and necessary exercise of jurisdiction and control by local airport

operators of their proprietary interest over their facilities.

"The French and British Governments. . . have decided to produce SST's regardless of cost and resulting environmental deteriorations. . .To what extent do we control our own destiny economically and environmentally? Having decided not to put SST's in operation, must we still do so because of the pressure of foreign governments? Even more basic is the issue of whether commercial and political interests make it impossible for modern man to protect his own atmosphere and senses. The supersonic transport symbolizes this issue. Our response to its challenge will indicate our future. Is the quality of life or the advance of technology to guide us?

For me, aviation has value only to the extent that it contributes to the quality of the human life it serves. . .

My personal conclusion is that the regular operation of SST's in their present state of development will be disadvantageous both to aviation and to the people of the world."

Charles A. Lindbergh
July 27, 1972

ARGUMENT

THE PORT AUTHORITY'S RESOLUTION OF MARCH 11, 1976 IS A VALID EXERCISE OF AN AIRPORT OPERATOR'S JURISDICTION UNDER FEDERAL LAW WHICH JURISDICTION HAS BEEN SPECIFICALLY SANCTIONED BY CONGRESS.

The District Court's decision of May 11, 1976, pivots upon one legal determination with respect to the grounds upon which the Airlines sought relief.

> ". . .the PA resolution. . .is in irreconcilable conflict with the federal examination of the question and the federal orders thereon and the PA resolution must give way under the Supremacy Clause in the Constitution." (Opinion p. 29).

That decision constitutes error and, moreover, was rendered in total disregard of applicable law and legislative history, the authority of which has been repeatedly acknowledged by the key federal officials.

The facts upon which the District Court based its decision were purportedly all contained in the uncontroverted statement submitted by the Airlines pursuant to Rule 9(g) of the General Rules of the District Court and are discussed at

pages 3-5 of its opinion. The State does not quarrel with the 9(g) statement.

The meat of the District Court opinion starts with a discussion of a peculiar decision of 13 years vintage. Coxsey v. Hallaby, 231 F. Supp. 978 (W.D. Okla. 1964). As will be shown, the Coxsey case predates virtually all of the relevant cases, legislative history and statements of federal officials.

Coxsey involved a suit by property owners against the Air Force and the FAA to enjoin the defendants from continuing a sonic boom test program. The plaintiffs had obtained a temporary injunction in state court whereupon the case was removed to federal district court. The district court vacated the state court order and granted defendants summary judgment. The Court of Appeals reversed the district court, stating that the case could not be determined without

further proceedings. The court refused to accept without further scrutiny the assertion by the federal parties

> "that the activities of the appellees-defendants are unqualifiedly valid because of the general authority granted the Federal Aviation Agency to develop and study supersonic air transportation." Coxsey v. Hallaby, 334 F. 2d 286, 287 (10th Cir. 1964) (footnotes omitted).

The Air Force and the FAA purported to act under Section 312(b) of the Federal Aviation Act of 1958. 49 U.S.C. § 1353(b). The Court of Appeals took note of the appellants-plaintiffs' denial of any "right of the appellees to use them as guinea pigs to determine the bounds of human tolerance to sonic boom." 334 F. 2d 287. On remand, in the Coxsey decision relied on by Judge Pollack in this case, the Oklahoma District Court disposed of the plaintiffs' claims on numerous grounds, relying in part on the claim that the test program was one authorized by 49 U.S.C. § 1353(b), which authorizes the Federal Aviation Administrator to undertake service testing in furtherance of the creation of improved aircraft. It is significant that the district court found

> "the sonic boom test program. . . is. . .providing the armed forces with information which is useful to the defense efforts of the United States." Coxsey v. Hallaby, 231 F. Supp. at 979.

Unfortunately, the plaintiffs in Coxsey apparently did not go back to the Court of Appeals to contest the issue of the FAA's authority under 1353(b). This is undoubtedly because shortly after the Tenth Circuit reversed the district court the government terminated the testing program. United States v. Gravelle, 407 F. 2d 964, n. 1 (10th Cir. 1969). As a result, the courts have never been forced to grapple with the wisdom of the Oklahoma District Court's ruling on the issue of § 1353.

In any event, no considerations of national defense are even remotely involved in the instant case, nor is § 1353 involved in any way. Secretary Coleman specifically stated in great detail, and obviously with great concern, the statutory authority upon which he based his February 4, 1976 decision. Not once did he allude to § 1353. The District Court erred in substituting § 1353 as the basis for the Secretary's decision on Concorde. The court's post hoc attempt to broaden or modify the decision of the Secretary of Transportation is impermissible under the rule of law which directs judges to address the scope of agency action "solely by the grounds invoked by the agency". NLRB v. Columbia University, 541 F. 2d 922, 930 (2d Cir. 1976); Local 814, Int'l Br. of Teamsters v. NLRB, 546 F. 2d 989 (D.C. Cir. 1976).

Even if § 1353(b) had been invoked by the Secretary, the State submits, in the language of the Court of Appeals in Coxsey, that Air France and British Airways have no right to force the use of New York residents as "guinea pigs to determine the bounds of human tolerance." Nor, as will be discussed below, does even the federal government maintain that the PA may be compelled to unwillingly participate in such an experiment. Indeed, the President of the United States has acknowledged that the February 4, 1976 decision on Concorde does not conflict with or affect the PA's jurisdiction with respect to Concorde operations at JFK and the PA's ability to refuse landing rights to certain aircraft. See p. 17; infra.

The District Court did not speak to these facts. Instead, Judge Pollack shifted to a discussion of the Federal Aviation Act, as amended (49 U.S.C. § 1301, et seq.), stating that, as to the promulgation of regulations to abate aircraft noise, the authority of the Administrator of the FAA is paramount. However, the federal government has not promulgated any regulation in the present case. Under the very statute to which the District Court refers for the promulgation of noise regulations (49 U.S.C. § 1431; see Opinion, p. 17) two proposals for "SST" noise standards were submitted to the

FAA by the United States Environmental Protection Agency on February 27, 1975 and January 13, 1976. 41 Fed. Reg. 51522 (Nov. 22, 1976). They have since been under review, however, no action has been taken by the FAA.*

The District Court cited a portion of the legislative history underlying the 1968 amendment to the Federal Aviation Act, 49 U.S.C. § 1431, which bears repetition:

> ". . .the Federal Government is in no position to require an airport to accept service by noisier aircraft. . .the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations". S. Rep. No. 1353, 90th Cong., 2d Sess. at p. 7 (1968); Def. App., 2a.

This Congressional policy was recognized by the United States Supreme Court in City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973). The court, while ruling that all State and local police power regulation in the field of aircraft noise abatement had been preempted by Congress, stated

* Even if the proposals had been adopted, the PA ban on the Concorde would not be preempted due to the PA's status as the proprietary operator of JFK. The law underlying this claim will be discussed in the following pages.

that it was not changing the law with respect to the right of local airport operators to take action to limit aircraft noise. In a footnote the court referred to the clear legislative history underlying section 611 of the Federal Aviation Act, 49 U.S.C. § 1431(a), and its amendment by Congress in the form of the Noise Control Act of 1972, 86 Stat. 1234. See S. Rep. No. 1353, 90th Cong., 2d Sess. at pp. 2, 6, 7, 10 (1968). The Court quoted from a letter of the prior Secretary of Transportation;

> "'Airport owners acting as proprietors can presently deny the use of their airport to aircraft on the basis of noise considerations so long as such exclusion is non-discriminatory.'" 411 U.S. at 635, n. 14.

Subsequent cases have distinguished between exercises of a State's police power and exercises of proprietary interest in local airport operation, reaffirming the law with respect to Congress's preemption of the State police power. However, the cases have continued to uphold the exercises of proprietary interest in airport operations as not being federally preempted. Air Transport Association v. Crotti, 389 F. Supp. 58, 65 (N.D. Cal. 1975).

More recently, in a suit involving as yet inoperative state legislation on Concorde, the District Court for the Northern District of New York stated,

> "It is interesting to note that on March 24, 1976, the Secretary [of Transportation] stated that it was established federal policy that a local airport proprietor under certain circumstances has had authority to refuse landing rights, and for the present it remains the policy of the department of transportation". Brown v. Carey, ___ F. Supp. ___, No. 76-CV-103 (N.D.N.Y. 1974); Memorandum Decision, pp. 2-3 (decided May 13, 1976).

Indeed, the President has informed the British and the French governments that he

> "cannot direct the Port Authority. . . to reach a particular decision." New York Times, February 17, 1977, p. 78, col. 1.

He has asknowledged that while he had authority to permit flights into Dulles,

> "Kennedy airport is not under my control at all. I have nothing to do with it, no authority over it. The New York Port Authority has that decision to make. . ." New York Times, March 6, 1977, p. 33, col. 1.

While the District Court made brief mention to the wealth of legislative history the Court failed to explain away or even confront significant portions of that history and the recent federal reiterations of policy with respect to the jurisdiction of local airport operators which actually refute the District Court's views.

The Court is unsuccessful in its attempt to establish a "conflict" between the PA resolution and the Secretary's decision on Concorde which would render the PA's resolution invalid under the Supremacy Clause.

In February of 1976 while testifying before Congress on the effect of his recent decision on Concorde, the Secretary was specifically confronted with a question regarding the PA's power to ban Concorde operations at JFK. The Secretary stated in response that,

> "At present, it is our view that such action by an airport proprietor which is non-discriminatory and not an unreasonable burden on foreign or interstate commerce has not been preempted by FAA action." Hearings on Current and Proposed Federal Policy on the Abatement of Aircraft Noise -- Subcommittee on Aviation of the House Committee on Public Works and Transportation, 94th Cong., 1st and 2d Sess. at 705 (1975-76).

The Secretary was pressed on that point because of his now famous "footnote 6" on page 3 of his decision which reads in part,

> "The FAA is the proprietor of Dulles and it is therefore part of may decision today to direct the Federal Aviation Administration to

> permit one Concorde flight per day at Dulles by each carrier under the conditions noted. The situation with respect to JFK may be complicated by the fact that under federal policy that has hitherto prevailed a local airport proprietor has had authority under certain circumstances to refuse landing rights."

The fact that the Secretary saw no legal conflict between his decision on Concorde and the PA's ability to regulate noise at JFK is further demonstrated by Appendix I to his decision ("Secretary of Transportation's Comments on Safety"):

> "The other major concern about safety that is within the FAA's jurisdiction is the ability of the Concorde to execute the left turn off of Runway 31 left at JFK, which will be necessary to comply with the Port Authority's noise regulations." (Secretary's Decision on Concorde, Appendix I, p. I-4; emphasis supplied).

Of course, this was wholly consistent with his statement of November 13, 1975 that the Airlines could operate Concorde at United States air terminals only if he amended their operations specifications and only if the "airport operators agree." See page 5, supra. This consistent view expressed by the

responsible federal administrative agency is entitled to great weight. Udall v. Tallman, 380 U.S. 1, 4 (1965); United States v. American Trucking Assns, Inc., 310 U.S. 534, 549 (1940); Jno. McCall Coal Co. v. United States, 374 F. 2d 689, 691 (4th Cir. 1967); Murphy Oil Corp. v. Hickel, 439 F. 2d 417, 421-422 (8th Cir. 1971).

* * *

The PA's denial of permission to the Airlines of the use of JFK pending further action by the PA Board is an action well within the bounds of Congress' legislative framework for aircraft noise control. The action was specifically anticipated by the Secretary of Transportation prior to his February 4, 1976 decision on Concorde and subsequently acknowledged by the government as being a valid exercise of the PA's jurisdiction.

The District Court's opinion is unsupported by the statutes and the federal decisions on the subject. It should be reversed.

The State urges this Court to maintain the status quo pending a decision on this appeal by extending the stay.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND THE COMPLAINT DISMISSED.

Dated: New York, New York
May 27, 1977

Respectfully submitted,

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THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

November 13, 1975

To Those Interested in the Concorde:

Today I have released a copy of the Environmental Impact Statement on the applications of Air France and British Airways for amendment of their operations specifications. If granted, the amendments would authorize the carriers to operate Concorde supersonic aircraft in limited commercial service to New York and Washington provided the airport operators agree. Since the Federal Aviation Administration has jurisdiction over Dulles, a decision on the operations specifications necessarily also embraces a decision on landing at Dulles. I am also releasing a copy of the issues as I have analyzed them. We have released this Statement and a statement of the issues early because of the intense public interest in the environmental impact of the Concorde and the procedure I will follow in reaching a decision.

On January 5, 1976, I will personally hold a public session in Washington for six hours to hear the views of interested groups addressed to issues relevant to the decision. A copy of the hearing notice is enclosed. If you desire to be heard, please note the particular issues you intend to address. I intend to reach a final decision not later than February 4, 1976.

The Environmental Impact Statement prepared by the Federal Aviation Administration is detailed and thorough. We are therefore not recirculating it as a draft. We welcome any comments you may have, either endorsing its conclusions or pointing out what you take to be inaccuracies. If, after the hearing, we are convinced that amendment to the final statement is necessary, we will either revise or supplement it.

I look forward to the public session in reaching a decision on this complex and important matter. When it is concluded, I will issue a formal decision paper.

William T. Coleman, Jr.

APPENDIX A

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOHN F. SHEA, III, being duly sworn, deposes and says that he is an Assistant Attorney General in the office of the Attorney General of the State of New York, attorney for Defendants-Appellants herein. On the 27th day of May, 1977 he served the annexed upon the following named persons:

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Attorneys in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the addresses designated by them for that purpose.

John F. Shea

Sworn to before me this
27th day of May, 1977

Richard D. Bergen

Assistant Attorney General
of the State of New York

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